56TH CONGRESS, 2d Session. } SENATE. { DOCUMENT No. 104.

HISTORY OF THE RIO GRANDE DAM AND IRRIGATION COMPANY, ETC.

JANUARY 22, 1901.—Referred to the Committee on Foreign Relations and ordered to be printed.

Mr. CARTER presented the following

MEMORIAL TO THE SENATE OF THE UNITED STATES IN RE BILL S. 3794, REPORT NO. 1755, CALENDAR NO. 1736, FIFTY-SIXTH CONGRESS, SECOND SESSION—HISTORY OF THE RIO GRANDE DAM AND IRRIGATION COMPANY AND THE ELEPHANT BUTTE DAM CASE—WITH ABSTRACTS FROM DECISIONS OF THE UNITED STATES COURTS RELATING TO THE USE OF WATERS OF NON-NAVIGABLE STREAMS FOR IRRIGATION PURPOSES.

[Bill introduced by Mr. Culberson, March 26, 1900, and referred to the Committee on Foreign Relations. Reported by Mr. Money, December 19, 1900, without amendment.]

To the Honorable Members of the United States Senate.

GENTLEMEN: Your Committee on Foreign Relations, in its report as above, having recommended that bill S. 3794 be passed, I take the liberty, as a citizen of New Mexico (an integral part of the United States, denied for more than half a century a vote in Congress), whose Territorial rights are threatened, and as the largest holder of the debenture bonds of the irrigation company, whose legally acquired rights and valuable irrigation works the bill proposes to confiscate, of respectfully submitting the following particulars for your consideration:

The bill, like its counterpart (H. R. 9710, Fifty-sixth Congress, first session) introduced in the House by Mr. Stephens, of Texas, purports to be "A bill to provide for the equitable distribution of the waters of the Rio Grande between the United States of America and the United States of Mexico."

But the two general purposes of the bill are the reverse of equitable:

(1) To prevent an American company from constructing a storage dam on the Rio Grande at a point known as Elephant Butte, in Sierra County, N. Mex., about a hundred miles above El Paso, Tex., for the irrigation of lands lying wholly within the United States.

(2) To provide for the construction, by the United States, of an "international dam" across the river at a point in the canyon some 2 or 3 miles above El Paso, primarily in order to supply water to citizens of the Republic of Mexico, and secondarily for the irrigation of lands in Texas.

The bill also incidentally provides for the cession to the Republic of Mexico of certain lands now forming part of the Territory of New Mexico in order that the dam provided for under the bill may be strictly international, one-half in the United States of America and one-half in the United States of Mexico.

This proposal to build an "international dam," wholly at the expense of the United States, is based on the contention that Mexico is entitled to one-half of the waters of the Rio Grande above, as well as below, the point on the southern boundary of the Territory of New Mexico from whence the river becomes the boundary line between the two Republics.

For some years it has been claimed by the residents of that portion of old Mexico abutting on the southern boundary of the Territory of New Mexico and along the western bank of the Rio Grande that, owing to the appropriation of the waters of the Rio Grande for irrigation in Colorado and New Mexico, Mexico has been deprived of her proportion of the waters of the river, waters to which, it is alleged, Mexico is entitled under the provisions of article 7 of the treaty of Guadalupe Hidalgo of February 2, 1848; article 1 of the Gadsden treaty of December 30, 1853; article 3 of the convention of November 12, 1834, and article 1 of the convention of March 1, 1889. Consequent upon this alleged violation of treaty on the part of the United States, the late Mexican minister, M. Romero, filed a request with the State Department that the United States Government should prevent any further work on the Rio Grande by the Rio Grande Dam and Irrigation Company, a company regularly incorporated under the laws of New Mexico and engaged in carrying out a great irrigation system to supply water to several hundred thousand acres of fertile alluvial land in the Rio Grande Valley in the southern part of the Territory. Claims of citizens of Mexico for damages by reason of being deprived of the use of the waters of the Rio Grande for irrigation were also filed with the State Department, amounting in the aggregate to something over $35,000,000.

Out of these proceedings on the part of the Mexican Government and its citizens a scheme was evolved and put forward whereby a treaty, a draft of which is now on file in the State Department, would be entered into between the United States and Mexico, under the terms of which the United States would undertake to build an "international dam," as now provided for in the bill S. 3794, in satisfaction of Mexico's claim.

Whether by treaty or under the principles of international law Mexico has any right to the waters of the Rio Grande where the course of that river (which is a nonnavigable stream, excepting for a short distance above its mouth, nearly a thousand miles below El Paso) flows wholly through United States territory, is a question I do not feel competent to express an opinion upon, but I beg to submit that there is at least one section in the pending bill which, if enacted by Congress, could not be enforced, as it is opposed to the spirit and letter of the Constitution. I refer to that section of the bill which is intended to destroy the water rights of the Territory of New Mexico and the vested rights and property of the Rio Grande Dam and Irrigation Company.

While Congress has power to regulate commerce with foreign nations, between the several States and with Indian tribes, and this power carries with it jurisdiction over navigable waters forming highways between States and between the United States and foreign

nations, the Federal Government has no jurisdiction over the nonnavigable waters within the borders of any State, with two exceptions: (1) To preserve, so far as may be necessary, the navigability of navigable waters to which such nonnavigable waters contribute; (2) to preserve the riparian rights which citizens of the United States may have by reason of owning lands along the streams within such States.

THE RIO GRANDE DAM AND IRRIGATION COMPANY AND THE ELEPHANT BUTTE DAM.

In order that the status of the above company in its relation to the bill in question may be understood, a brief history of Rio Grande irrigation and of what is known as the Elephant Butte Dam case should be taken into consideration.

Thousands of acres of the land in the Rio Grande Valley in southern New Mexico have been irrigated since the Spaniards first founded colonies in that part of "New Spain" over three hundred years ago, and since annexation to the United States a large area of the irrigable lands of the valley has been cultivated by American citizens. Flourishing towns have grown up, and the Mesilla Valley, the principal subdivision of the Rio Grande Valley, is now recognized as one of the finest fruit and vine growing sections of the United States. But owing to the torrential character of the Rio Grande it has heretofore been difficult to adequately irrigate more than a relatively small portion of the highly fertile lands along the river.

From time to time during the past twenty years and more various means of raising capital for the construction of a great storage dam to impound the flood waters of the river have been proposed by citizens of the Territory. Government aid has again and again been sought and investment of private capital solicited, but without avail. At one time the Federal Government appeared seriously to entertain plans, recommended by the Irrigation Bureau, for the construction of a series of storage dams. Reservoir sites on the Rio Grande were surveyed by Government engineers, who reported favorably on the proposition, and these sites were duly reserved, but nothing came of it, and ultimately they were thrown open for public appropriation (act of 1891) for reservoir purposes.

In 1893 the Rio Grande Dam and Irrigation Company was incorporated under the laws of New Mexico. All the requirements of the Territorial and Federal statutes were complied with in order to legally establish the reservoir rights essential to the company's undertaking; and as the then condition of the money market in this country rendered it impossible to raise, at anything but prohibitive rates, the large amount of capital required to carry out the proposed works, I personally, being largely interested in the company, went abroad with a view to placing the company's debenture bonds in Europe.

Unfortunately, the mistrust of American industrial securities, especially of irrigation securities, had become so universal that notwithstanding large sums were expended in properly presenting the enterprise to capitalists none would risk investment, although all admitted the obvious merits of the company's undertaking.

In England the directors of a public company are individually and collectively responsible to investors for good management, and finding that foreign investors would be more likely to intrust their money to an English board of directors, an English company was formed to issue 8 per cent preference shares and 5 per cent debenture bonds (the

former at par, the latter at a premium of 5 per cent), to be secured by a lease of the American company's undertaking. An exceptionally influential board, the members of which invested extensively in the enterprise, was secured, and largely on the strength of the high rank and representative character of the members of the board, the necessary capital was underwritten and subscribed—subject to calls to be made from time to time as the proposed irrigation works were proceeded with.

Col. W. J. Engledue, R. E., an authority on irrigation engineering, for many years identified with the imperial irrigation works in India, visited the Rio Grande Valley on behalf of the English investors, and carefully investigated the engineering features of the enterprise and the titles of the American company. Work on the proposed dams and canals was begun; a great colonization system was organized; branch offices and agencies were established in Great Britain and on the Continent, and the company's literature, descriptive of the climatic and other advantages offered to settlers in the valley and of the resources of the Territory, was printed in English and French and widely circulated; contracts for the sale of large blocks of land for fruit and vine culture were made, the company undertaking to provide water within two years; agreements were entered into with the owners of the community ditches in the valley whereunder the American company would concede water rights to the landowners along such ditches in exchange for the community ditches and for blocks of land, the farmers to pay an annual water rent of $1.50 per acre for every acre irrigated. In fact, everything conducive to the colonization and development of the valley which good management could suggest and capital secure was provided for.

The landowners of the valley, to a man, favored the company's undertaking, as lands now practically valueless, or, where irrigated from the community ditches, worth but little more than a few dollars per acre, rapidly appreciated in selling value so soon as the company began work upon its canal system, large blocks being contracted for by subsidiary companies and sold to settlers at $100 an acre. Widespread interest in the enterprise in particular, and the resources of the Territory in general, was aroused both in this country and in Europe, and thousands of applications for lands were being received at the London office when, without a word of warning, the Attorney-General, at the instigation of the promoters of the international dam scheme, instituted proceedings with the avowed intention of invalidating the company's rights and of confiscating the valuable works that were in course of construction.

INJUNCTION SUIT AGAINST THE RIO GRANDE DAM AND IRRIGATION COMPANY.

In the absence of any legitimate grounds for the action, it was based upon the preposterous allegation that the company's works would interfere with the navigation of the Rio Grande in New Mexico. Later the plaint against the company was amended, the items being:

(1) That the Rio Grande is navigable at Elephant Butte, New Mexico, where the company proposes to create its main storage reservoir, and that consequently the company's dam would violate the United States statute prohibiting obstructions in navigable waters.

(2) That if the Rio Grande is not navigable at Elephant Butte, yet it is navigable near its mouth (some 900 miles below), and that the company's dam would lessen the navigable capacity of the river at this lower point.

(Parenthetically it may be stated that this wonderful and valuable navigation interest the Department affects to safeguard (?) is represented by one old flat-bottomed river boat, the *Bessie*, which only draws 28 inches of water and which occasionally succeeds in making short trips up the Rio Grande above tide water.)

(3) That to dam the Rio Grande at Elephant Butte and use the waters for irrigation in the valley below would result in a violation of the treaty obligations due from the United States to the Republic of Mexico.

The Government's bill of complaint and the answer thereto necessarily raised the question of Mexico's claim against the United States (now amounting to over $35,000,000) and the alleged *raison d'etre* of an international dam at El Paso. The latter, strangely enough, the authorities seem to think could not interfere with the alleged navigability of the Rio Grande, and thus prejudice the sacred rights of the *Bessie*.

Bearing in mind that the Federal authorities have for years maintained, in opposition to Mexico's claim, that the Rio Grande is not a navigable stream, and that therefore the use of the waters of the river by American citizens in Colorado and New Mexico is not a violation of the Guadalupe Hidalgo and Gadsden treaties; that the late Attorney-General Harmon, in response to an official request for an opinion, had officially declared the river not to be navigable in the sense claimed; that engineers employed by the Government had selected reservoir sites on the Rio Grande for irrigation in New Mexico; that subsequently these reservoir sites had been thrown open for appropriation; that the company's selection of a reservoir site at Elephant Butte had been officially approved by the Secretary of the Interior, at whose request the company's plans had been slightly altered, the action of the Department of Justice in instituting proceedings, as above, was, to say the least, remarkable.

Correspondence on file in the Departments proves conclusively that when the supporters of the international dam project first sought to prevail upon the authorities to take action against the company the company's rights were declared by the then Attorney-General, the Secretary of the Interior, and others consulted to be unassailable. It was not until later that the Secretary of War was beguiled into stating that if the Rio Grande was a navigable stream in New Mexico the company's rights had not been properly acquired, inasmuch as his Department's consent to the impounding of the waters of the Rio Grande had not been sought and obtained. The United States Boundary Commission was referred to for information as to the navigability of the Rio Grande, and as Gen. Anson Mills, director of the United States Boundary Commission, was and is one of the principal promoters of the international project, the Department was promptly advised that the river is navigable in New Mexico, logs having been floated down the river many years ago when the stream was in flood.

Proceedings were consequently instituted, as above stated, to enjoin the company from completing its works, and in due course the case came on for hearing in the Third judicial district court of New Mexico. A vast amount of testimony was submitted on both sides, but the evidence was overwhelmingly against the Government. The court decided the case, with costs, in the company's favor and dissolved the injunction.

The Attorney-General then ordered an appeal to the Territorial supreme court, which court decreed as follows:

(1) Under the treaties with Mexico each Republic reserves all rights within its own territorial limits. This would have been so upon principles of international

law without such reservation. States lying wholly within the United States belong exclusively to it, and the soil within the United States is not burdened with a servitude in favor of Mexico in respect to any duty to so discharge the water as to promote or preserve the navigability of the Rio Grande.

(2) It is not the capacity of a stream to float a log or a rowboat which renders it a navigable river within the acts of Congress (1890 to 1892), but whether, at regular periods of sufficient duration and in its regular condition, its capacity is such as to be susceptible of beneficial use as a public highway for commerce. The Rio Grande in New Mexico is not a navigable river.

(3) The power to control and regulate the use of waters not navigable exercised by States and Territories in the arid West was confirmed by Congress by the act of 1866, and that power now resides wholly in such States and Territories under the act of 1877; and subsequently, therefore, the diversion of such local waters is not a violation of any act of Congress even though the navigable capacity at a distance below may become thereby impaired. (Vide transcript of record No. 753, supreme court of New Mexico, July term, 1897.)

These two decisions having been so decisively against the Government, it was naturally assumed that in view of the facts submitted in the case, which were wholly in the company's favor, the decision of the Territorial supreme court would be accepted as final. But the matter was allowed to drag on for months, greatly to the detriment of the company's works, which were being seriously damaged by floods, and then an appeal to the Federal Supreme Court was filed.

The people of the valley petitioned Congress, and urgent representations were made to the Departments, explaining the injustice that would be inflicted upon the company and upon the people of New Mexico if the completion of the works were further delayed by an appeal to the Federal Supreme Court. It was pointed out:

(*a*) That the plaintiffs have been twice defeated in their own tribunals;

(*b*) That the delay that would be occasioned by an appeal to the Federal Supreme Court would leave costly unfinished works to be destroyed by spring floods, entailing enormous loss; and

(*c*) That the Treasury of the Government should not be used to crush legitimate private enterprise or to deprive citizens of New Mexico of their rights.

The Attorney-General, however, notwithstanding these urgent appeals, refused to drop the case, and on the 10th of October, 1898, the appeal to the Federal Supreme Court was heard. The court practically decided all points of law in the company's favor, but referred the case back to the lower court for inquiry as to the question of fact, viz, Would the company's works, if completed, "substantially" interfere with the navigability, "as at present existing," of the lower reaches of the Rio Grande—some 900 miles below? The court held that Federal jurisdiction could be exercised to prevent such use of the nonnavigable waters of any State or Territory as would "substantially" lessen the navigability of navigable streams to which such waters are tributary; but that no authority, judicial or legislative, has ever intimated that Congress has power to say to Colorado: "You must not use the waters of the Rio Grande for mining and irrigation to the detriment of the mining and irrigation interests of citizens of New Mexico." The court in substance declared that Congress can not interfere with any use that any State may make of streams within its borders, unless such streams cross the State line and contribute to navigable waters below, and then only in the interests of navigation or to preserve its own riparian rights.

Justice Brewer, in this case (U. S. *v.* Rio Grande Dam and Irrigation Company et al., 174 U. S., 690, supra), after stating the common law and defining the rights of riparian owners, declared:

While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, it is also true that as to every stream within

its dominion a State may change this common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.

Again, he said:

Notwithstanding the unquestioned rule of the common law in reference to the right of the lower riparian proprietor to insist upon the continuous flow of the stream as it was, although there has been in all the Western States an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain States and the reclamation of arid lands in others compelled a departure from the common-law rule and justified an appropriation of flowing water both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in these States by custom and by State legislation a different rule—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes.

The court thus recognized the power of a State to change the common law with regard to the use of the water of nonnavigable streams, subject to two limitations:

First, that in the absence of specific authority from Congress, a State can not by its legislation destroy the right of the United States, as the owner of the lands bordering on a stream, to the continued flow of its waters: so far, at least, as may be necessary for the beneficial uses of Government property.

Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

The Supreme Court has therefore clearly defined all constitutional limitations to the use of nonnavigable waters. The first relates to riparian rights which the United States may have as the owner of lands bordering on a stream, but, be it remembered, such riparian rights have been surrendered by direct legislation (acts 1866, 1877, 1891; R. S., 2339; 1 Supp. R. S., p. 137; R. S., pp. 249–251) in all the arid States; hence the first limitation may be considered as settled and disposed of.

The second limitation is based specifically and wholly upon the power of Congress to preserve the navigability of navigable streams, and it may be exercised for such purpose only.

The Federal Supreme Court having referred the question of fact back to the lower court for inquiry, the company, assuming that the findings of the court of inquiry would be accepted as final, and knowing, in view of the evidence that would be submitted, that the findings of the court must inevitably be in the company's favor, prepared to resume work at the earliest possible moment.

In December, 1899, the court of inquiry devoted some twelve days to the consideration of evidence as to the question of fact, and on the 3d of January following the court handed down its decision finding in the company's favor on all points and declaring that "the company's works would not interfere with the navigability of the Rio Grande."

The Government thereupon attempted to have the case reopened, but the court dismissed the application for a new trial. The Attorney-General then appealed to the Territorial supreme court, and on the 3d of May last this second appeal was heard, and again the lower court was fully upheld, the court in its decision even going to the length of implying that the attempt on the part of the Government to create and introduce fresh evidence as to the question of fact, with a view to having the case reopened, was unwarranted and without precedent. (See Appendix.)

Before the sitting of the court of inquiry, in December, 1899, an agreement was signed by the United States attorney and the two attorneys sent out by the Department of Justice, undertaking, in the

event of the Government appealing to the Federal Supreme Court, to expedite the hearing of such appeal in every way possible. This was over a year ago, but the Attorney-General did not order an appeal until just before the Presidential election; and this order was suppressed, for the time being, evidently for political reasons. In fact, our attorneys have not as yet received formal notice of appeal, and only learned of it through the United States attorney incidentally mentioning the fact in the course of conversation about a month ago. That this second appeal to the Federal Supreme Court can serve no proper end and has not been made in good faith must, it would seem, be obvious to any unbiased mind. I respectfully submit that the appended abstracts (Appendix hereto) from the decisions of the courts in this case justify the conviction that the litigation has been needlessly prolonged by appeals against the findings of the court of inquiry as to the question of fact.

SENATE RESOLUTION, FEBRUARY 22, 1898.

Something of the history of the attempts that have been made to destroy the franchise rights and to confiscate the property of the Rio Grande Dam and Irrigation Company may be gathered from Senate Doc. No. 229, Fifty-fifth Congress, second session. This document was compiled and transmitted to Congress in response to a resolution of the Senate of February 22, 1898, requesting the President—

> If not incompatible with public interest, to transmit to the Senate the proceedings of the international commission authorized in the concurrent resolution of Congress of April 29, 1890, and a subsequent international convention between the United States and Mexico of May 6, 1896, and also the correspondence relating thereto with Mexico by the Department of the Interior, Department of War, and Department of Justice, as well as the Department of State, relating to the equitable distribution of the waters of the Rio Grande River, including the draft of an incomplete treaty between said Governments, negotiated between the late Secretary of State, Mr. Olney, on the part of the United States, and Mr. Romero on the part of Mexico, and all the correspondence between said officials relating thereto.

From the wording of this resolution it may be assumed that the Senate desired all the information obtainable in the Departments touching the subject, but it is obvious that the resolution and the resulting document (like the pending bill) were inspired and manipulated by the same parties responsible for the various attempts that have been made to deprive the people of New Mexico and Colorado of their legitimate right to the use of the waters of the Rio Grande, and in particular to destroy the legally acquired and vested rights of the Rio Grande Dam and Irrigation Company.

Although a considerable part of the Senate Doc. No. 229 above mentioned is devoted to correspondence more or less irrelevant to the subject, practically every paper that militates against the "international-dam" proposition was suppressed either in part or as a whole, while every paper favorable to the international-dam project and to Mexico's claim was included. It is no exaggeration to say that if the attorney of the Mexican Government had been handed the files of the Department from which to compile the response to the Senate resolution he could not have produced a document more favorable to the Mexican claim. Even Attorney-General Harmon's opinion, an authoritative and definite official statement, directly bearing on the subject, was entirely omitted.

BILL S. 3794.

Adverting to this bill (S. 3794), I would first point out that its title and preamble are along the same lines as the title and preamble of the concurrent resolution dated April 29, 1890, Fifty-first Congress, first session (referred to in the Senate resolution of February 22, 1898), which reads as follows:

CONCURRENT RESOLUTION Concerning the irrigation of arid lands in the valley of the Rio Grande River, the construction of a dam across said river at or near El Paso, Tex., for the storage of its waste waters, and for other purposes.

Whereas the Rio Grande River is the boundary line between the United States and Mexico, and whereas by means of irrigating ditches and canals taking the water from the said river, and other causes, the usual supply of water therefrom has been exhausted before it reaches this point where it divides the United States of America from the Republic of Mexico, thereby rendering the lands in its valley arid and unproductive, to the great detriment of the citizens of the two countries who live along its course; and

Whereas in former years annual floods in said river have been such as to change the channel thereof, producing serious avulsions and oftentimes and in many places leaving large tracts of land belonging to the people of the United States on the Mexican side of the river, and the Mexican lands on the American side, thus producing a confusion of boundary, and disturbance of public and private titles to lands, as well as provoking conflicts of jurisdiction between the two Governments, offering facilities for smuggling, promoting the evasion and preventing the collection of revenues by the respective countries; and

Whereas these conditions are a standing menace to the harmony and prosperity of the citizens of said countries and the amicable and orderly administration of their respective Governments: Therefore,

Resolved by the Senate (the House of Representatives concurring), That the President be requested, if, in his opinion, it is not incompatible with public interests, to enter into negotiations with the Government of Mexico with a view to the remedying of all such difficulties as are mentioned in the preamble to this resolution, and such other matters connected therewith as may be better adjusted by agreement or convention between the two Governments; and the President is also requested to include in the negotiations with the Government of Mexico all other subjects of interest which may be deemed to affect the present or prospective relations of both Governments.

This ill-constructed resolution is the only act of Congress which refers to the construction of a dam across the Rio Grande at El Paso. It is the only authority for the large expenditures which have been made to determine whether or not it is practicable to construct a dam at El Paso, and it is also the sole authority for the various and persistent attacks during the last five years upon the Rio Grande Dam and Irrigation Company.

As this concurrent resolution is the basis of bill S. 3794 and the Report No. 1755 thereon, it is proper to examine it somewhat critically. Although the report states that by the concurrent resolution Congress has provided for "a definite and authoritative ascertainment of the facts relating to the irrigation of the arid lands in the valley of the Rio Grande and the construction across the said river of a dam at El Paso, Tex.," it will be observed that the only reference in the resolution to a dam across the river is contained in its title. The subject is not again referred to either in the preamble or the body of the resolution. In fact, there is no "definite" direction to investigate the feasibility of a dam or its cost, and there is certainly no direction to construct a dam.

The first clause of the preamble declares, in substance, that by means of irrigating ditches and canals, taking water from the Rio Grande in the State of Colorado and in the Territory of New Mexico, the flow of the stream has become so diminished that the farmers

living below the southern boundary line of New Mexico, along the borders of the river in the State of Texas and in the Republic of Mexico, have been deprived of their usual supply of water for the irrigation of their lands.

The second clause of the preamble merely refers to the occasional changes in the course of the river, where it forms the boundary line between the United States and Mexico, owing to the floods causing avulsions and sometimes leaving large tracts of lands, belonging to the people of the United States, on the Mexican side of the river, or vice versa, and thus producing a confusion of boundary and a disturbance of public and private titles to lands, facilitating smuggling, and promoting the evasion and preventing the collection of revenues by the respective countries, etc.

Upon these two clauses the resolution (like the report of the Committee on Foreign Relations, which embodies the resolution) is built up. From any point of view this resolution must be considered unique and altogether sui generis; but taken by itself and analyzed, the resolution can hardly be held as an authorization to construct an international dam at El Paso, or to make expensive surveys and investigations to ascertain whether such a dam could be constructed, or to institute proceedings to prohibit the construction of dams above El Paso.

Doubtless the tyro in legislation who drafted the resolution had in mind the authorization of a treaty to provide for an international dam and the prohibition of any irrigation works above El Paso likely to render an international dam at El Paso unnecessary, but such authorization hardly would be looked for in the title of the resolution, and the authoritative part can be found only in its preamble where such preamble is referred to and made a part of the resolution proper.

Attention is specifically called to this resolution chiefly because its bungling terms evidence that it had its inception with parties not properly connected with Congress; that it was drawn by some hand unfamiliar with the making of laws, the same apparently responsible for the bill S. 3794, introduced by Mr. Culberson, and the House bill (H. R. 9710, Fifty-sixth Congress, first session) introduced by Mr. Stephens.

It will be noted that in the third clause of the preamble of the bill it is proposed by the Government of Mexico and the Government of the United States that the alleged deficiency in the flow of the Rio Grande shall be made good by impounding the flood waters of the river by means of an international dam and reservoir, but for the sake of argument, admitting the expediency of an international dam as a means of satisfying Mexico's claim against the United States, surely the rights of the people of New Mexico equally are deserving of consideration at the hands of Congress.

The bill purports to provide for the equitable distribution of the waters of the Rio Grande, but to deprive the people of New Mexico and Colorado of their inherent and justly inalienable right to the use of the waters of the Rio Grande for the irrigation of their lands in order to provide water for the Mexican farmers below can hardly be considered an equitable proposition.

The fourth, fifth, and sixth clauses of the preamble speak for themselves. The indirect reference to the Elephant Butte Dam as a "contemplated project" is, however, decidedly misleading. The Elephant Butte undertaking has long passed the contemplative stage. The fact is entirely ignored that already large sums have been expended on

the company's irrigation works, which, if completed, may be made to serve every purpose contemplated by the promoters of the international project, except the enrichment of the owners of the lands that would have to be condemned for reservoir purposes if a large storage dam were built at El Paso.

Mexico's claim can be satisfied, if need be, by water from the Elephant Butte Reservoir for a tithe of the cost of an international dam at El Paso, for the amount which is proposed should be appropriated for the international dam falls far short of the sum that would be required to build a large storage dam at any point in the El Paso Canyon. The engineers' report referred to in the concurrent resolution above quoted shows that suitable bed rock for a foundation was not discovered at a depth of over 90 feet, and to build a storage dam 90 or 100 feet high across a wide canyon and based on a foundation going down over 90 feet below the bed of the river would cost a great deal more than the amount it is proposed should be appropriated. Without suitable bed rock the construction of a large storage dam of the magnitude contemplated at the site suggested in the canyon above El Paso would be to court certain destruction for the thousands of inhabitants in the valley immediately below.

The last clause of the preamble of the bill is apparently intended to justify the two sections of the bill which follow. The first section is intended to provide a means of prohibiting the building of the Elephant Butte Dam. Although the bill proposes to inhibit the appropriation and storage of the waters of the Rio Grande or its tributaries in the Territory of New Mexico, there is not the slightest doubt that the provisions of this section are intended to apply specifically to the Elephant Butte Dam and Reservoir, as the Elephant Butte Dam site is practically the only feasible site for a large storage reservoir on the Rio Grande—that is, the only site where a large storage dam may be built with absolute safety and at a reasonable cost.

The second section of the act authorizes the Secretary of State to proceed with the consummation of the proposed treaty between the United States and Mexico; and then if Mexico will accept one-half of the water to be impounded in the proposed international reservoir in satisfaction of the pending claims above referred to, the Secretary of State is authorized to proceed with the construction of the so-called international dam.

The two propositions are novel, to say the least. First, the Secretary of State is authorized to proceed to make a treaty between our Government and a foreign power; second, he is further authorized to build a dam and create a reservoir at a cost of some millions of dollars.

THE PEOPLE FAVOR THE ELEPHANT BUTTE DAM.

The Elephant Butte enterprise is an undertaking that has the entire sympathy of the people of New Mexico, and, as a matter of fact, a large majority of the people of the city of El Paso also favor the building of the Elephant Butte Dam. Practically all of the citizens of El Paso, excepting those directly and indirectly interested in the lands that would be supplied with free water from an international dam or in the lands that would have to be condemned and paid for by the Government for reservoir purposes, appreciate and take into consideration the serious danger that a large storage dam just above the city would entail.

As evidence of the disposition of the people of El Paso I would state that in September last the El Paso Chamber of Commerce and its irrigation committee passed the following resolutions:

Resolved, That it is the sense of the El Paso Chamber of Commerce that no obstacle should be placed in the way of the project of the Rio Grande Dam and Irrigation Company, but, on the contrary, it should meet with all encouragement; and, furthermore, any enterprise that is intended to provide the people of the Mesilla Valley (the principal subdivision of the Rio Grande Valley in southern New Mexico) with a water supply should meet with the support of the people of El Paso; and

Be it further resolved, That in the matter of the suit now pending against the Rio Grande Dam and Irrigation Company it is the sense of the chamber of commerce that said suit should be speedily decided and all litigation pending that interferes with the building of said dam should be settled, and we favor such action by the proper authorities as will result in a prompt settlement of all pending litigation.

The resolution passed by the irrigation committee reads as follows:

Resolved, That this committee recommend that the board of directors of the chamber of commerce pass resolutions petitioning the State Department at Washington to request the Department of Justice to accept as final the decisions of the supreme court of New Mexico in the case of the Government against the Rio Grande Dam and Irrigation Company.

The disposition of the people of New Mexico in regard to the Elephant Butte undertaking is evidenced by the following quotation from the platforms of the Democratic and Republican parties as adopted in their respective conventions last October:

Republican.—We condemn the provisions of the so-called Stephens bill, now pending before the Congress of the United States, which bill, in terms, inhibits the people of this Territory from acquiring rights in the waters of the Rio Grande and its tributaries, such as can be and are now being acquired by the inhabitants of Colorado and Texas; which prohibits the use, impounding, and detention for legitimate commercial purposes of the waste waters arising in and flowing through New Mexico, and which removes from the jurisdiction of our Territorial courts litigation over the local rights involved in these momentous questions. We further favor the immediate construction of the Elephant Butte Dam.

Democratic.—We are unalterably opposed to the Stephens bill. We further condemn the antagonistic attitude of the McKinley Administration toward the irrigation interests of this Territory. We deprecate as wholly unwarranted the pernicious litigation that has for four years, despite five decisions against the Government, prevented the impounding of the flood waters of the Rio Grande at Elephant Butte for the irrigation of the farming lands of the Rio Grande Valley * * * thus discouraging private enterprise and driving capital from the Territory.

The Hon. M. A. Otero, governor of New Mexico, in his annual report to the Secretary of the Interior (1899) says:

The greatest setback New Mexico has ever had was that resulting from the stopping of work on what is familiarly known as the Elephant Butte Dam. The general plan * * * was to construct a mammoth dam at Elephant Butte, and form at this point the largest storage reservoir in the world. In addition to the large dam, a series of smaller ones were to be constructed, together with canals, and by this means bring under irrigation and cultivation hundreds of thousands of acres of the most fertile land on this continent. * * * Work was commenced in 1896, and continued until in 1897 the United States brought suit to enjoin the company from building the storage dam. Work had to be stopped, and that already done was left in such a condition as to be subjected to great damage by the annual floods. The ground for seeking the injunction was that the Rio Grande is a navigable stream.

This claim is preposterous. The Rio Grande is not, and never has been, a navigable stream, except where it is affected by the tide. The true secret of the attack can be found in the efforts to have constructed at El Paso an international dam. * * * It is to be hoped that this question will be shortly settled, and the company permitted to resume operations, for with the completion of this work will blossom forth one of the richest agricultural, fruit, and dairy sections in the West.

It will outrival California, and supply the East with a better quality of fruits and vegetables than can be produced in any other section of America.

Governor Otero's protest against the attacks on the Elephant Butte enterprise, like many similar protests communicated to the Attorney-General, was, however, ignored. Apparently the Government is determined that neither the natural rights of the people of New Mexico, nor the rights of the investors in the Elephant Butte enterprise are to be allowed to stand in the way of the international dam project.

As evidence of the sinister influence that has been at work in the promotion of the international dam scheme, I beg to quote the following from the El Paso Daily Herald (Republican), November 16, 1900. The Herald says:

When Gen. Anson Mills (director of the International Boundary Commission) went to the city of Mexico last month he went there to ask the secretary of state and President Diaz to continue their objections to the building of the Elephant Butte and other dams on the Rio Grande above El Paso.

Inspection of the correspondence on file in the Departments partially reveals the extent to which Gen. Anson Mills has been identified with the international dam scheme, and I venture to suggest that Gen. Anson Mills exceeds his duty as an officer of the United States Army, as director of the International Boundary Commission, and as a servant of the United States when he urges the government of a foreign country to instruct its minister at Washington to oppose the legitimate use by American citizens of the waters of an American river for the irrigation of American lands. I hold that I do not exceed my right or my duty as an American citizen when I protest against such conduct on the part of an American official.

Trusting that the Rio Grande Dam and Irrigation Company's undertaking to create the largest artificial lake in the world; to impound for the use and benefit of American citizens the flood waters of the Rio Grande; to make over half a million acres of land, now practically worthless, equal in value and productiveness to the best lands in southern California; to spend large sums in colonizing the Rio Grande Valley and in developing its splendid resources; to create a vast revenue-producing, tax-paying property, capable of providing prosperous homes for thousands of American families, may not be jeopardized by any act of your honorable body, and hoping that the defenseless condition of the people of New Mexico, so long denied a voice in the councils of the nation, will appeal to your consideration, I confidently leave the fate of bill S. 3794 to your sense of justice.

Your obedient, etc.,

NATHAN E. BOYD,
Director-General the Rio Grande Dam and Irrigation Company.

THE PORTLAND,
Washington, D. C., January 10, 1901.

APPENDIX.

ABSTRACTS FROM THE DECISIONS OF THE SUPREME COURT OF NEW MEXICO IN THE ELEPHANT BUTTE DAM CASE, WITH DECISIONS OF THE FEDERAL AND STATE COURTS CONCERNING THE USE OF THE WATERS OF THE ARID REGIONS FOR IRRIGATION PURPOSES.

Supreme court of New Mexico, July term, 1897. The United States (appelant) *v.* The Rio Grande Dam and Irrigation Company et al. (appellees). No. 753. Appeal from the third judicial district court.

This is a suit in equity brought by the United States to restrain the Rio Grande Dam and Irrigation Company from constructing or maintaining a dam across the Rio Grande, at Elephant Butte, in the Territory of New Mexico. * * *

The ground upon which the claim of the Government is predicated is that the Rio Grande is a navigable river, and that the proposed dam will obstruct the navigation of the river, the flow of waters therein, and interfere with its navigable capacity; and that such obstructions would be contrary to the treaty with Mexico, and in violation of the acts of Congress.

A preliminary injunction was granted, and the defendants ordered to show cause why it should not be continued. The defendants answered, denying that the Rio Grande is a navigable river, and also filed pleas justifying, under their right of way for canals and reservoirs secured under the act of Congress of 1891 and certain Territorial laws.

Upon the hearing, the court below held that upon the facts presented by affidavit, as well as other facts of which it took judicial notice, the Rio Grande is not a navigable stream within the Territory of New Mexico, and that the bill does not state a case entitling it to the relief prayed; and upon the complainant's declining to amend its bill further, the court dissolved the injunction and dismissed the bill. From that judgment the United States appealed to this court. * * *

Unless the Rio Grande is a navigable stream, and its "navigation" or "navigable capacity" will be obstructed by the proposed dam, the statutes do not apply to the case and can not be invoked to enable the Government to stop the progress of the work by injunction.

It is alleged in the original bill that the Rio Grande, from and including the site of the proposed dam, has been used to float logs for commercial and business purposes and for affording a means for commercial traffic within and between the Territory of New Mexico and the State of Texas and the Republic of Mexico. In the amended bill it is alleged that the said river is susceptible of navigation for commercial purposes up to Lajoya, in the Territory of New Mexico, about 100 miles above Elephant Butte. In both the river is alleged to be navigable at certain points below El Paso.

It is conceded that the navigability of waters is a matter of which courts take judicial notice. The record contains a large mass of information in the form of maps, reports of exploring and surveying expeditions made under the direction of the War and Interior Departments, and also reports of officers specially detailed to investigate the feasibility of rendering the river commercially navigable by improvements, and also its capability of supplying reservoirs for irrigation. From these and other data the following facts, as stated in the opinion of the court below, are well established. * * *

The course of the Rio Grande in New Mexico is through rocky canyons and * * * valleys over fine, light soil of great depth. * * * Only two instances were shown where the river was actually utilized for the conveyance of merchandise, and these were timbers; one of these instances occurred in 1858 or 1859, when a raft was sent down from Canutillo to El Paso, a distance of 12 miles; and the other recently, when some telegraph poles were floated from La Joya, a "short distance." * * *

From Bernalillo, N. Mex., to Fort Hancock, Tex., the Rio Grande is in the highest degree spasmodic, with immense floods during a few weeks of the year and a small stream during the remainder of it. (Tenth Annual Report Geol. Surv., p. 99.)

From personal observation, I know that these seasons of flood and drought (in the valley of the Rio Grande) were of about the same character thirty years ago. (Maj. Anson Mills, Tenth United States Cavalry, Rep. Spec. Com. Sen., vols. 3 and 4, p. 39.)

But, what is of more importance, we have the reports of officials upon the exploration of the river made under the direction of the Government for the special purpose of considering its navigability. From these it appears that—

The stream is not navigable, and it can not be made so by open-channel improvement. * * * Certainly there is no public interest which would justify the expenditure of the many millions of dollars which such an improvement would involve. The irrigation of the valley is a matter in which the inhabitants are most deeply interested, while the possible navigation of the river receives little or no attention from them. In my judgment, the stream is not worthy of improvement by the General Government. (Report of O. H. Ernst, major of engineers, to Secretary of War, 1889.)

Again:

I consider the construction, not only of an open river channel, but of any navigable channel, to be impracticable. During the greater part of the year, when the river is low, the discharge would be insufficient to supply any navigable channel, except perhaps a narrow canal with locks, the construction of which, on a foundation of sand in places 46 feet deep, would be financially, if not physically, impracticable. (Report of Gerald Bagnell, assistant engineer, to Secretary of War, 1889.)

The navigability of a river does not depend upon its susceptibility of being so improved by high engineering skill and the expenditure of vast sums of money, but upon its natural present conditions. In the case of the *Daniel Ball*, 10 Wallace, 557, the Supreme Court says:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used, in the ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

In the case of the *Montello*, 20 Wallace, 431, the court says:

If it be capable in its natural state of being used for purposes of commerce, no matter in what mode that commerce may be conducted, it is navigable in fact and becomes a public highway. The vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce.

The court approves the language of Chief Justice Shaw in 21 Pickering, 344, who said:

> In order to give it the character of a navigable stream, it must be generally and commonly useful to some trade or agriculture. (See also Morrison *v.* Coleman (Ala.), 3 L. R. A., 344.)

Of course it need not be perennially navigable, but the seasons of navigability must occur regularly and be of sufficient duration and character to subserve a useful public purpose for commercial intercourse. While the capacity of a stream for floating logs or even thin boards may be considered, yet the essential quality is that the capacity should be such as to subserve a useful public purpose. (Angell, Water Courses, 335.) In a recent case the supreme court of Oregon says, per Thayer, C. J.:

> Whether the creek in question is navigable or not for the purposes for which appellant used it, depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accommodate but a few persons, it can not be considered a navigable stream for any purpose. It must be so situated, and have such length and capacity as will enable it to accommodate the public generally as a means of transportation.

And in the same case Lord, J., said:

> It must be susceptible of beneficial use to the public, be capable of such floatage as is of practical utility and benefit to the public as a highway.

And of the stream then in question he says:

> It is not only not adapted to public use, but the public have made no attempt to use it for any purpose. (Haines *v.* Hall (Oregon), 3 L. R. A., 609.)

The supreme court of Alabama says:

> In determining the character of a stream, inquiry should be made as to the following points: Whether it be fitted for valuable floatage; whether the public or only a few individuals are interested in transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use, beneficially, to the public. (Roads *v.* Otis, 33 Ala., 578; Peters *v.* N. O., M. and G. R. Co., 56 Ala., 532.)

Indeed, in the letter of inquiry by the Hon. Richard Olney, Secretary of State, in respect to the facts as to the navigability of the Rio Grande, he says:

> It should be remembered that a mere capacity to float a log or a boat will not alone make a river navigable. The question is whether the river can be used profitably for merchandise. I have been informed that wood is sometimes brought down the river to Ciudad Juarez in flatboats, and that logs are rafted or floated down from the timbered lands on the upper river for commercial purposes. (Letter, January 4, 1897.)

The Secretary of State seems to have been misinformed as to such use for commerce. This letter was addressed to Col. Anson Mills, at whose request it appears that application for right of way for irrigation by the use of the waters of the Rio Grande and all its tributaries was suspended throughout New Mexico and Colorado. The answer of Colonel Mills deals almost wholly with the river internationally; the river, in its relation to interstate commerce, is dismissed by him with the instance of the floating of a raft of logs in 1859 from a point 18 miles above El Paso, and the qualifying remark, "it would now hardly be practicable to do so." (Letter, January 7, 1897.)

It is particularly clear that the Rio Grande above El Paso has never been used as a navigable stream for commercial intercourse, in any manner whatever, and that it is not now capable of being so used. On the other hand, it has been, from the earliest times of which we

have any knowledge, used as a source of water for irrigation. The valley has always been the center of population in New Mexico. It was the first portion of this region to be occupied and settled by civilized man; and the population of this valley has always been and is now absolutely dependent for means of livelihood and subsistence upon the use of the waters of this river for irrigation of their fields and crops. Dams have been erected and maintained at El Paso for nearly two hundred years, by which the river has been obstructed and its waters diverted for irrigation to both sides of the Rio Grande. But never until the present time, so far as we can ascertain, has any question been raised by anyone as to interference with any use of the river for purposes of navigation. Indeed, it appears from the affidavits and reports presented in support of the bill in this case that the objection now raised to the construction of the defendants' dam grows out of the proposed construction of an international dam and reservoir at El Paso, to be constructed under the auspices of the two Governments.

The investigation of the feasibility of such an international dam and reservoir is being made on behalf of the United States under the authority of Congress, thus evincing the deliberate intention of the Government, by its political department, to take measures, not for the purpose of improving the navigability of this river, but of permanently obstructing it at a point far below the site of defendants' works, and thus to devote the stream to irrigation instead of navigation. One of the affidavits in support of the bill is made by the commissioner of the United States engaged upon this investigation, the object of which he states to be "the study of a feasible project for the equitable distribution of the waters of the Rio Grande to all persons residing on the banks or tributaries having equitable interests therein." And he also states in one of his reports that "the probable flow of water in the river here (El Paso) is likely to be ample for the supply of the proposed international reservoir, but that the flow will not be sufficient to supply the proposed international reservoir here and allow for the supply for the proposed reservoir of the Rio Grande Dam and Irrigation Company, at Elephant Butte, in New Mexico, or any other similar reservoirs in New Mexico, and but one of these schemes can be successfully carried out."

That is to say, in order to render feasible the storage of water for irrigation at El Paso, it is essential to prohibit all similar structures along the river at points above.

From these extracts it seems clearly apparent that the work at El Paso, to which the United States has committed itself tentatively, at least, is not designed to preserve or improve the navigability of the river, but to facilitate the distribution of the waters which may be gathered by obstructing the stream for the benefit of riparian occupants; and that the object of this proceeding is not to secure a public benefit from the navigation of the Rio Grande, but rather, under the guise of a question of navigability of the stream, to obtain an adjudication of the interests of rival irrigation schemes, in aid of one locality against another. Manifestly, neither the acts of Congress cited nor the provisions of the treaty have any application to questions of this kind, and they can not be invoked to settle conflicting local interests whose determination must necessarily depend upon entirely different considerations.

The Rio Grande, as we have said, flows through a region dependent upon irrigation. It is a part of what is known as the arid region of this country, embracing, according to the report of the Director of the

Geological Survey, about four-tenths of the entire area of the United States in which the rainfall is not sufficient for the production of crops. Here, the paramount interest is not the navigation of the streams, but the cultivation of the soil by means of irrigation. Even if, by the expenditure of vast sums of money in straightening and deepening the channels, the uncertain and irregular streams of this arid region could be rendered to a limited extent navigable, no important public purpose would be subserved by it. Ample facilities for transportation, adequate to all the requirements of commerce, are furnished by the railroads. * * *

But, on the other hand, the use of the waters of all these streams for irrigation is a matter of the highest necessity to the people inhabiting this region, and if such use were denied them it would injuriously affect their business and prosperity to an extent that would be an immeasurable public calamity. These conditions have been distinctly recognized in the legislation of Congress, for while it has refrained from any attempt to render streams like the Rio Grande navigable by artificial works, and has not in any way treated them as navigable waters, Congress has, by the reservation or survey of reservoir sites along its valley, and the appropriation of large sums of money for the prosecution of investigations and surveys to this end, clearly indicated its purpose to treat these waters as suitable only for irrigation, and to consider such a use of them as the one of commanding importance.

The riparian rights of the United States were surrendered in 1886 (R. S., 2339). Prior to that time it had become established that the common-law doctrine of riparian rights was unfitted to the conditions in the far West, and new rules had grown up under local legislation and customs more nearly analogous to the civil law. Recognizing that the public domain could not be utilized for agricultural and mining purposes without the use of water applied by artificial means, and that vast interests had grown up under the presumed license of the Federal Government to the use of such waters, Congress confirmed the rights of prior appropriations of waters by the act above mentioned, where the same "are recognized and acknowledged by the local customs, laws, and decisions of the courts." (Sec. 3339.) The Supreme Court of the United States, in passing upon this act, observes:

> It is evident that Congress intended, although the language is not happy, to recognize as valid the customary law with respect to the use of the water which had grown up among the occupants of the public lands under the peculiar necessities of their condition. (Atchison *v.* Peterson, 20 Wall., 507; Basey *v.* Gallagher, 20 Wall., 671. And since 1870, patents for lands expressly except vested water rights.)

Congress has manifested a purpose to extend the largest liberty of use of waters in the reclamation of the arid region under local regulative control. Following in line with the act of 1866, the act of 1877 authorized the entry of desert lands in the arid region by those who intend to reclaim them by conducting water upon them. * * *

This act was limited to States and Territories in the arid region (1 Supp. R. S., p. 137). Colorado was included in 1891 (1 Supp. R. S., pp. 249–251). By the act of 1888 (an appropriation bill) an investigation was directed as to the extent to which the arid region might be redeemed by irrigation; it provided for the selection of sites for reservoirs for the storage and utilization of water for irrigation and the prevention of overflows, and that the lands designated for reservoirs, ditches, or canals, and all lands susceptible for irrigation therefrom

be reserved from sale or entry (1 Supp. R. S., p. 698). * * * On the 26th day of February, 1897, Congress opened the reservoir sites, reserved by the Government under the act of 1891, to private location, and the local legislators were authorized to prescribe rules and regulations and fix water charges. (Decision Interior Department, vol. 18, p. 168.)

Considering the discussions in Congress, the reports of committees, and the labors and reports of officials in the Interior and War Departments, made under Congressional directions, it seems quite manifest that the purpose by the Federal Government to hold and further redeem the great arid region had become the recognized policy. * * * It would appear that at first it was the design to establish and maintain an elaborate system of irrigation at public expense, but the immense cost of such an enterprise seems to have induced its abandonment temporarily, at least, and in its stead another system has been provided by irrigation at private cost. The system may be incomplete in many of its details, but such as it is, reservoir sites have been located, surveyed, and established along the streams, navigable and nonnavigable, under the immediate direction of Government officials and by authority of Congress; and the right to make private entries of others under the supervision of the Secretary of the Interior is also authorized.

Ruins of extensive irrigation systems of a prehistoric people, scattered all over New Mexico and Arizona, show that conditions which have confronted the present age were conditions encountered in the remote past and apparently overcome. The cultivation of the Rio Grande Valley by acequias from the river is mentioned by the earliest Spanish priests and explorers and is established by authentic historical memorials extending back more than two centuries. The law of prior appropriation existed under the Mexican Republic at the time of the acquisition of New Mexico, and one of the first acts of this Government was to declare that "the laws heretofore in force concerning water courses * * * shall continue in force." * * * In 1874 it was provided that—

> All of the inhabitants of the Territory of New Mexico shall have the right to construct either private or common acequias and to take water for said acequias from wherever they can, with the distinct understanding to pay the owner through whose lands said acequias have to pass a just compensation for the land used. (C. L., sec. 17.)

In 1887 an act was passed giving authority to corporations to construct reservoirs and canals, and for this purpose to take and divert the water of any stream, lake, or spring, provided it does not interfere with prior appropriations. (Session acts, 1887, chap. 12.) Other acts have been passed since in regard to the acquisition of water rights. But this legislation is not peculiar to New Mexico. Its general characteristics are common throughout the West, where the doctrine of prior appropriation prevails. Thus was the character of local legislation, which Congress recognized, confirmed and authorized by the various acts to which reference has been made. The doctrine of prior appropriation has been the settled law of this Territory by legislation, custom, and judicial decision. Indeed, it is no figure of speech to say that the agriculture and mining life of the whole country depends upon the use of the waters for irrigation; and if rights can be acquired in waters not navigable, none can have greater antiquity and equity in their favor than those which have been acquired in the Rio Grande Valley in New Mexico.

It is contended that because the Rio Grande is capable of navigation to a limited extent several hundred miles below the point of the proposed dam its construction will, by arresting the flow of water in the stream, interfere with its navigable capacity, and that it is therefore prohibited by the act of 1890. From the foregoing discussion of the legislation of Congress and the conditions prevailing in the region under consideration it would seem to follow that if there were a conflict between the interests of navigation and agriculture in relation to a stream like the Rio Grande that of the latter would prevail. Certainly it should be held to be under the protection of the courts against any doubtful interpretation or application of a penal statute. If the waters of the Rio Grande are not navigable in New Mexico, which we hold to be the case, then they can not be said to be waters in respect of which the United States has jurisdiction. And certainly, in the absence of some express declaration to that effect, it can not be supposed that Congress intended to strike down and destroy the most important resources of this vast region in order to promote the insignificant and questionable benefit of the navigation of the Rio Grande for a short distance above its mouth.

For the construction contended for does not limit the prohibition of the act of Congress to the works proposed by the defendants. It applies to the maintenance as well as the original creation of obstructions. If defendants' dam at a point where the river is not navigable is an obstruction to the navigable capacity of the river several hundred miles below, the same must be said of every dam and irrigation ditch which diverts water from the river or any of its confluents at their primary sources. If upon this ground it is competent for the United States to prohibit the erection of defendants' dam, it is equally competent for it to compel the removal of every dam and head gate heretofore constructed on the Rio Grande and its tributaries, and prohibit the use of their waters for irrigation throughout this entire valley. * * *

In view of the condition and history of the region which would be affected, the unimportance of the Rio Grande as a waterway for commercial intercourse at any point, its nonnavigability at the place of the proposed construction and for hundreds of miles below, and the evident purpose of Congress by its legislation to promote irrigation throughout this portion of the country, even to the extent of further obstructions of this very stream, it would, in our opinion, be unreasonable to hold that legislation, which has a definite and well-understood purpose in furtherance of the public interest in these portions of the country to whose conditions it is applicable, was intended to operate to the detriment of the public interests in regions to whose conditions it is not applicable and where its enforcement would be destructive of the very interests which the legislation of Congress has otherwise undertaken to promote.

We therefore hold that the work sought to be enjoined in this action is not in violation of any law of the United States or any treaty, and that the judgment of the district court dissolving the injunction and dismissing the bill should be affirmed, and it is so ordered.

THOMAS SMITH, *Chief Justice.*

I concur in the conclusion reached.

N. B. HAMILTON, *A. J.*
N. B. LAUGHLIN, *A. J.*

Supreme court of New Mexico, January term, 1900. The United States, appellant, *v.* The Rio Grande Dam and Irrigation Company et al., appellees. No. 879. Appeal from the Third judicial district court (as to question of fact).

The judge of the court of inquiry, after giving an exhaustive summary of the evidence submitted as to the question of fact, said:

I find that the intended acts of the defendants in the construction of a dam or dams, or a reservoir, and in appropriating the waters of the Rio Grande, will not substantially diminish the navigability of that stream within the limits of the present navigability.

The judges of the Territorial supreme court, in handing down their decision in the appeal against the findings of the lower court, state:

We have examined the record, which is very voluminous and shows that the whole matter was thoroughly gone into, and we conclude that the facts as set forth in the findings of the learned judge below are sustained by the evidence, and we adopt same as the findings of this court.

The lower court in the finding of fact found that the proposed acts of the defendants will not substantially diminish the navigable capacity of the Rio Grande within the present limits of navigability. It seems clear to this court (the Territorial supreme court) that the appellant utterly failed to establish the fact that the proposed acts of the defendants would have the effect alleged upon the Rio Grande. * * *

It must follow as a natural consequence upon the finding that the proposed acts of the defendants will not impair the navigable capacity of the Rio Grande that the appeal should be dismissed. The only purpose of the appeal was to enjoin such acts of the defendants only so far as they might affect that result.

The proposition submitted in support of the application for a rehearing is a proposal not to produce evidence which already exists, but to create evidence not existing at the time of the trial or of the application. We think no sufficient diligence has been shown by the Government in this case in regard to this evidence. From the time of the issuing of the mandate by the Supreme Court of the United States remanding this case for investigation the Government took no steps whatever to furnish this evidence. It is not shown in the application why no such steps were taken.

Even during the trial of this case it must have been as much apparent to counsel for the Government that this testimony was required to support the appeal as it was after the finding of fact came from the trial judge. No mention of the same was made or any application presented to the court at that time. Again, it is not shown by this application that the result of any such proposed investigation would change the conclusion reached in this case. The Government simply asks that this case be reopened for the purpose of permitting it to make an experiment which it should have made before that time, and the result of which no one undertakes to foretell. * * * We know of no rule, taking into account even the great public importance of this case, which would authorize this court or the court below to reopen the case under such circumstances. (See Rogers *v.* Marshall, etc.; Burrows *v.* Ween was a case of the trial by the chancellor, as this was, and a similar application was made and denied.)

The refusal of the court (the lower court) to find the ultimate fact in this case in favor of the Government was, as we have before stated, in full accord with our view of the testimony in this case, and was therefore correct. We find no error in the record, and the decree of the lower court will be affirmed, and it is so ordered.

WILLIAM J. MILLS, *Chief Justice.*

We concur.

JOHN R. MCFIE, *A. J.*
J. W. CRUMPACKER, *A. J.*

LAWS OF THE UNITED STATES RELATING TO THE USE OF WATER FOR IRRIGATION.

Prior to 1866 various States and Territories west of the Mississippi had enacted laws regulating the use of waters in the streams and lakes

for mining and agricultural purposes. All these laws were based on the theory that the first appropriator was entitled to the water, or so much as was necessary for his purposes. The following statutes of the United States directly affirm this State and Territorial legislation and encourage the use of the waters for such purposes, and especially for the purpose of irrigation:

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purpose herein specified is acknowledged and confirmed; but whenever any person in the construction of any ditch or canal injures or damages the possessions of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (Rev. Stat., 429.)

SEC. 2340. All patents granted or preemption or homesteads allowed shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

Nineteenth Statutes, 377 (Sup. 2d ed., 137, 1887).—"An act to provide for the sale of desert lands," etc., which, after providing in the first section a method by which said lands might be filed upon and water conducted upon the same for irrigation purposes, there follows this proviso:

Provided, however, That the right to the use of water by the person so conducting the same on or to any tract of desert land of 640 acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights.

This statute was specifically made applicable to California, Oregon, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota. Afterwards, in 1891, it was made applicable to Colorado. (Sup. 2d ed., 941.)

Twenty-fifth Statutes, 526.—Congress in the sundry civil bill provided for the survey of reservoirs and canal sites, and for reserving from sale all such sites and all lands that would be watered by such reservoirs, and appropriated $100,000 therefor. (Also see Sup. 2d ed., 626.)

Twenty-fifth Statutes, 960.—Congress again provided in the sundry civil bill for investigating the extent to which the arid region of the United States can be redeemed by irrigation and the segregation of irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation, and made an appropriation of $250,000 to pay the expenses.

26th Statute, 391.—Here Congress again, in the sundry civil bill, legislated with reference to the question of irrigation, and repealed the act providing for the withdrawal from entry of lands in the vicinity of reservoir sites, except that the reservoir sites themselves, theretofore located or selected, should remain segregated and reserved from entry or settlement, as provided by law, and reservoir sites thereafter located or selected on public lands should in like manner be reserved from the date of location or selection thereof.

26th Statute, 1101.—Congress restricted the reserves about reservoir sites to the land necessary for the reservoirs.

28th Statute, 422–423.—Appropriates desert lands to the various States and Territories on certain conditions of reclaiming the same by irrigation, the aggregate amount not exceeding 1,000,000 acres, being section 4 of the sundry civil bill of August 18, 1894.

28th Statute, 635–636.—This is an act authorizing the use of public lands for reservoirs and canals, giving 50 feet on either side of the same.

29th Statute, 484.—An act providing for reservoirs on the public lands by persons or corporations engaged in breeding live stock, etc.; reservoirs not to exceed 160 acres.

29th Statute, 599.—All reserved reservoir sites are by this act thrown open to appropriation by individuals, corporations, and States, under the act of March 3, 1891, limited by the following proviso:

Provided, That the charge of water coming in whole or part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulations of the respective States and Territories in which such reservoirs are in whole or part situate.

SUPREME COURT DECISIONS.

The Supreme Court has also rendered a number of decisions upholding as valid and proper the local laws and customs regulating the appropriation of water in the arid States.

In Atchison *v.* Peterson (20 Wal., 507) the court decides that prior appropriation of running waters for mining purposes gives the better right to their use.

In Basey *v.* Gallagher (20 Wal., 670) the court quotes section 2339, Revised Statutes, and recognizes as valid the customary laws with respect to the use of water which has grown up among occupants of public lands under the peculiar necessities of their condition. It also declares the act (sec. 2339) is applicable to the use of water for irrigation. The water in this case was taken from Avalanche Creek, near its junction with the Missouri River, and thus formed a part of the upper waters of the Missouri, and theoretically contributed to the navigability of the river at points below where it was navigable. (See also Jennison *v.* Kirk, 98 U. S., 453; 25 L. Ed., 240.)

In Broder *v.* Natoma W. and M. Co. (101 U. S., 274; 25 L. Ed., 790) Justice Miller delivered the opinion of the Supreme Court in the following language:

We are of opinion that it is the established doctrine of this court that the rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the act of 1866, and that the section of the act which we have quoted was rather a voluntary recognition of a preexisting right of possession, constituting a valid claim to its continued use, than the estabment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument: Atchison *v.* Peterson, 20 Wall., 507 (87 U. S., XXII, 452); Forbes *v.* Gracey, 94 U. S., 762 (XXIV, 313), Jennison *v.* Kirk (ante, 240).

DECISIONS OF STATE COURTS.

In addition to the authorities above cited there are numerous State decisions, all to the same effect. These have been collected and grouped under the subtitle "Appropriation" on page 6 of a pamphlet entitled "A digest of the decisions of the supreme courts of the States and Territories of the arid region, of the United States circuit and Supreme Courts, in cases involving questions relative to the use and control of the water in that region." This pamphlet was compiled by D. W. Campbell, esq., of the United States Geological Survey, and revised and edited, under the direction of the Secretary of the Interior, by W. C. Pollock, esq., of the Assistant Attorney-General's Office for the Interior Department. It is a Government print of 1889.

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